Supreme Court, U. S.
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No. 74-1487

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

THE UNITED STATES OF AMERICA, PETITIONER

vs.

COLIN F. MacCOLL[illegible], RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (App. A, infra) and the dissent from the denial of rehearing en banc (App. B, infra) are reported at 511 F.2d 1116. The order of the district Court (App. D, infra) is unreported.(Appendix references are to Petition).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether an indigent prisoner, poorly educated, who did not appeal his original trial conviction, is entitled to a transcript of his trial at public expense in order to prepare his application for post conviction relief pursuant to 28 U.S.C. 2255 where the prisoner asserts good faith belief of error; no independent memory of error; no alternative to the transcript is available to demonstrate the error, and the District Court has found a lack of frivolity in the claim of error by granting leave to proceed in forma pauperis pursuant to 28 U.S.C. 1915(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the pertinent provisions of the United States Constitution and Code set forth in the Petition, p.2-3, the following provisions are set forth in relevant part:

First Amendment:

> Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.

Article 1 §9, Clause 2. Suspension of habeas corpus.

> The Privilege of the Writ of Habeas Corpus shall not be a suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

28 U.S.C. §753(b)

> One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges, and shall record verbatim by shorthand or by mechanical means . . . (1) all proceedings in criminal cases had in open court; . . . (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding.

28 U.S.C. §1915(b)

> In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

STATEMENT

Petitioner's statement accurately summarizes the history of the proceedings below. Additional relevant facts include the following:

Respondent is a poorly educated, white male without formal education in the law. Respondent was convicted in a criminal trial on June 4, 1970. Respondent was represented by a court appointed attorney during these trial proceedings. According to Respondent, his appointed counsel did virtually no preparation for or participation in the trial and advised Respondent not to appeal his conviction "because it would interfere with Respondent's motion to modify sentence." Respondent was held in custody from the date of arrest until his release on parole last year.

During his period of incarceration following trial, Respondent was held in maximum security within the McNeil Island Federal Penitentiary and then transferred to Leavenworth, Kansas. The collateral proceedings which are before this Court were all begun while Respondent was "in the hole" at Leavenworth. Respondent was assisted in the early stages of litigation by the University of Kansas Law School Prison Project. Respondent, partially as a result of his confinement in these conditions, was unable to clearly recall the trial events other than his lack of advice or contact with his court appointed attorney. Petitioner had no trial notes of the proceedings and his court appointed trial attorney was unavailable for consultation.

The District Court, following the filing of the Complaint by Respondent, on June 23, 1972, granted the governments motion to dismiss "for failure to state a claim on which relief can be granted" on January 12, 1973. At the time of dismissal, the following facts as plead by Respondent were accepted by the District Court as true for the purposes of the Government's motion:

(1) Appellant is indigent (Record p. 2,4).

(2) Appellant's belief that the sought for transcript would assist him in preparation of his §2255 proceeding by revealing lack of effective assistance of counsel at trial and insufficiency of the evidence to sustain appellant's conviction, was a good faith belief and not frivolous (Record p. 4-5).

(3) Appellant had no effective alternative to the transcript since his memory, personal notes, etc., were inadequate to provide the requisite information (Record p. 5).

At all times, the preceding facts as plead by Respondent were assumed to be true by the court below in order to rule upon the government's motion to dismiss and for the issues to be reviewed by the Ninth Circuit and this Court.

ARGUMENT

The issue in the present case is a somewhat narrower one than asserted in the government's petition for certiorari and does not warrant review by this Court since the decision below is consistent with the prior holdings of this Court and the statutory scheme established by Congress. The actual issues litigated in this case are not inconsistent with decisions of other lower courts and are distinguishable from the cases asserted in the Petition. There is no important issue of judicial administration created by the holding below.

I. The Decision Below Is Narrow In Scope

The decision of the Ninth Circuit was limited by its language to an indigent federal prisoner who did not appeal his original trial conviction and who has been allowed to proceed in forma pauperis pursuant to 28 U.S.C. §1915 in processing his 28 U.S.C. §2255 application. The decision is further limited by

the factual context in which Respondent asserted his right to a transcript i.e., where the asserted grounds of error at trial are incompetence of counsel and lack of sufficiency of the evidence, each requiring a transcript to be properly argued and presented for review.

Although the broader issue of an unlimited right of transcript for indigent prisoners was argued by each side and discussed by the Ninth Circuit, the actual holding of the case does not reach this question.

II. The Decision Below Is Not Inconsistent With Other Lower Court Authority.

Petitioner has cited six Courts of Appeals with allegedly conflicting decisions:

> Six other courts of appeals have addressed the issue in federal cases. See Benthiem v. United States, 403 F.2d 1009 (C.A. 1), certiorari denied, 396 U.S. 945; United States v. Shoaf, 341 F.2d 832 (C.A. 4); Cowan v. United States, 445 F.2d 855 (C.A. 5); Bentley v. United States, 431 F.2d 250 (C.A. 6), certiorari denied, 401 U.S. 920; Culbert v. United States, 325 F.2d 920 (C.A. 8); Martinez v. United States, 344 F.2d 325 (C.A. 10).

The cases are distinguishable from Respondent's and are not in conflict.

Without exception, all of the cases cited are pre - Britt v. North Carolina, 404 U.S. 226 (1971), the most recent decision of this Court which specifically reserved the broader question asserted by Petitioner. Petitioner has cited no post-Britt case which is in conflict with the opinion of the Ninth Circuit.

In the First Circuit Case cited by Petitioner, Benthiem, supra, the petitioner therein filed a §2255 motion prior to the application for a transcript. A full hearing on said motion was had and the application for a transcript was made after the hearing on the merits had been concluded. At the hearing, where the only asserted error was the lack of assistance of counsel at trial, the reviewing court had before it an affidavit of the original trial counsel setting forth his efforts on

Petitioner's behalf, a government memo attesting to the competence of the trial attorney, and a concurrence by the appointed counsel for the petitioner that the original trial lawyer had not been incompetent.

Respondent herein, did not have such a hearing, no record of the frivolity of his assignments of error existed and the opposite was taken as true by the court in order for the motion to dismiss to be ruled upon. In other words, there was no record before the Court herein for dismissal of the underlying §2255 proceeding as there was in Benthiem which justified the conclusion that a transcript would not be of assistance to the petitioner therein.

In the Second Circuit case cited by Petitioner, U.S. v. Carella, supra, the facts are radically different from Respondent herein. In Carella, the issue was not availability of a transcript of a trial to aid in post-conviction relief proceedings, but rather a complete transcript of a prior mistrial to aid in preparation for a second trial. Carella asserted that he needed the transcript to aid him in cross-examination of government witnesses. In lieu of this complete transcript, Carella had been given a partial transcript including all of the prosecution's direct witnesses testimony and had available trial counsel's notes of all testimony, grand jury testimony and §3500 statements of witnesses. No allegation of need for the complete transcript was presented. Respondent herein, however, had none of these alternatives available and was seeking the transcript not for some hypothetical purpose but specifically for the preparation of his §2255 proceeding.

The Fourth Circuit Case of U.S. v. Glass, supra is not in conflict since Glass had plead guilty to the original charges and the basis of his §2255 proceeding was not trial error but

promises made to induce the guilty plea. No allegation of the necessity of the transcript to aid in presentation of this issue was made. Further, the district court in Glass did not rule upon the in forma pauperis application of Glass. The Fourth Circuit simply noted this apparent lack of necessity and remanded the case for a determination of the merits of the §2255 claim. Respondent herein, however, has alleged his good faith belief that his transcript is necessary for the preparation of his non-frivolous claims of error and no alternative source is available to him. Respondent's in forma pauperis application was ruled upon thereby determining the lack of frivolity of the claim. The decision below is not in conflict with Glass, supra.

Similarly, in U.S. v. Schoaf, supra, no allegation of error at trial was contained in the petitioner's request for transcript. The Fourth Circuit remanded for a determination of the necessity of a transcript since the lack of error alleged by Schoaf did not make it clear whether a transcript was appropriate. Respondent herein has alleged that this error which is in good faith asserts, can only be determined with the aid of a transcript. Schoaf is not only pre - Britt but precedes most of the case law development on right to transcript. See opinion below p. 3-10.

The Fifth Circuit case cited by Petitioner, Cowan v. U.S., supra, is a per curiam opinion without discussion of the facts or law applied other than to string cite earlier authority which, as does Cowan predates Britt and apparently is no different than those cases discussed, supra in other circuits. (See Skinner v. U.S., 434 F.2d 1036 (1970) a blanket assertion by the Petitioner of an absolute right to a transcript without any alleged error noted.) Respondent herein has alleged error and the necessity of the transcript for such error.

The Fifth Circuit case is also greatly different from Respondent's herein and not in conflict. In Bentley v. U.S., supra, the Sixth Circuit denied a request for transcript in a post-conviction relief motion where there had been an appeal taken from the original trial and stipulated facts and issues in lieu of a transcript had been agreed upon. In the subsequent post-conviction relief request for transcript by Bentley, no allegation of error was contained which indicated a need for a transcript rather than the original stipulation. Again, Respondent's factual setting and allegations are not on point.

Similarly, in the Eighth Circuit case cited by Petitioner, Culbert v. U.S., supra, the alleged error was limited solely to the asserted incompetency of counsel at trial and the request for a transcript occurred after the denial of the §2255 application on the merits. In other words, unlike Respondent herein, a litigation of the frivolity of the alleged error occurred prior to the request for transcript. The Eighth Circuit opinion relied heavily on U.S. v. Glass, supra, discussed supra.

Lastly, the 10th Circuit case cited by Petitioner, Martinez v. U.S., supra, recites that the alleged errors asserted by the Martinez "defy intelligent analysis." No further discussion of the allegations or relevancy of a transcript is made. Apparently this request for a transcript in the collateral proceeding was made only on appeal from the denial of the §2255 motion and was asserted as a general right. Respondent, herein asserted both specific error for which the transcript was required and requested the transcript prior to the district court ruling on the §2255 application.

The actual and narrow holding of the Ninth Circuit is not in conflict with the specific holdings of the other circuits cited by Petitioner. Rather, the only conflict is in the degree of showing of necessity required for production of a transcript. The

opinion below simply asserts that an adequate showing under Wade v. Wilson, 396 U.S. 282 (1970) and Britt v. North Carolina, supra, is accomplished where a good faith assertion of trial error is made, the District Court makes the §1915 certification of non-frivolity, and the petitioner is indigent. Petitioner submits that such a holding is consistent with the Wade and Britt decisions which are the latest statements by the Court and which post-date the case law relied upon by Petitioner.

III. There Is No Important Issue Of Administration of Justice

Petitioner asserts that the availability of transcripts should be uniform throughout the federal system and that the effect of the opionion below will be to open the floodgates of frivolous applications for transcripts of trials and further aggravate the load of the court reporters and burden the administration of justice with additional expenses.

As the opinion below notes, the present policy of Britt and Wade leaves the determination of necessity for a transcript to the lower courts on a case by case factual analysis. Neither the opinion below nor the Petitioner suggest any change in this procedure. The actual number of potential litigants in Respondent's position is probably quite small (See Opinion below pages 17-19), and actual cost or increase in burden very difficult to predict. As the opinion below points out (Op. p. 18), the present cost of litigating entitlement to transcript is more costly to the government (when it occurs) than the simple preparation of the transcript in many if not most cases.

Since the ruling below is confined to the small class of litigants who did not plead guilty, but went to trial and then failed to appeal, who can point to alleged error and who have

passed a frivolity screening process pursuant to §1915, its impact upon the present structure is slight at best. Indeed, by minimizing subsequent frivolous §2255 applications and hearings, the decision below may be seen as an appropriate apportionment of judicial resources.

Since the Opinion below is not inconsistent with the approach followed in other jurisdictions but is slightly more precise in establishing a rule for transcripts, it seems hard to argue that any great disparity in access to transcripts for indigent prisoners will result. Each case still requires a showing of non-frivolity and necessity consistent with Wade and Britt and accordingly, as discussed in detail supra §II, the apparent conflict between circuits asserted by Petitioner and the attendant lack of uniformity is largely illusory.

IV. The Decision Below Was Correct

Respondent will not reargue the merits of his position below. The Opinion below adequately addresses the dilemma of the narrow class of litigants represented by Respondent and the Opinion's analysis is complete.

Respondent does wish to call the Court's attention to the substantial constitutional issues which would have been raised had the majority below not interpreted the statutory and constitutional scheme as it did. The inter-relationship of 28 U.S.C. 753, 28 U.S.C. 1915 and 28 U.S.C. 2255, can conflict with Article I §9 Cl. 2, if interpreted to provide a lesser remedy than habeas corpus for federal prisoners or to limit access for such relief.

Additionally, if the statutory scheme were interpreted differently, First Amendment rights to petition for redress of grievances might be infringed; United Mineworkers v. Illinois State Bar Association, 309 U.S. 217 (1967), and substantial due

process issues would have been confronted, Wade v. Wilson, supra, and Griffin v. Illinois, 351 U.S. 12 (1955), see also The Indigent's Right to a Transcript of Record, 20 Kan. L.Rev. 746 (1972) and Allowance of In Forma Pauperis Appeals in §2255 and Habeas Corpus Cases, 43 F.R.D. 343 (1967).

The Opinion below is an adequate and reasonable refinement of the issues in Britt and Wade which does not require further review by the Court. Since the broader issue reserved by Britt and Wade is not presented by the narrow holding of the Opinion below because of the statutory interpretation followed, no issue of substantial federal import is presented herein.

V. Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully Sumbitted,

John A. Strait
Attorney for Respondent

July 23, 1975